

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Gregory Scott
Marshall Johnson
LeRoy Koppendrayner
Edward A. Garvey
Phyllis A. Reha

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of Qwest's Performance
Assurance Plan (QPAP)

ISSUE DATE: January 8, 2002

DOCKET NO. P-421/AM-01-1376

PROTECTIVE ORDER

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WHEREAS, the parties to this proceeding may request each other to produce certain valuable confidential, trade secret and business information including third party information, i.e., cost studies, computer models, work papers, customer proprietary network information, including payout information, analyses and other documentation ("Confidential Information").

AND WHEREAS, until the Commission has issued a protective order, the parties are unwilling to produce those responses which in the party's view are legally protected trade secret or otherwise confidential business information. The requesting parties desire the production of such information.

Therefore, in order to make these materials available for purposes of this proceeding, the Commission hereby issues the following Protective Order regarding the protection of confidential, trade secret and business information:

ORDER

1. (a) Confidential Information. All documents, data, information, studies and other materials furnished or made available pursuant to any interrogatories or requests for information, subpoenas, depositions, or other modes of discovery that are claimed by the parties to be of a trade secret, competitive or business nature shall be furnished pursuant to the terms of this Order, and shall be treated by all persons accorded access thereto pursuant to this Order as constituting confidential, competitive, trade secret, and business information, and shall neither be used nor disclosed except for the purpose of such proceedings, and solely in accordance with this Order. All material claimed to be trade secret Confidential Information shall be so marked by the party or its affiliates by

stamping each individual page with the designation, "TRADE SECRET -- SUBJECT TO PROTECTIVE ORDER IN QPAP DOCKET." All copies of documents so marked will be made on yellow paper. For purposes hereof, notes made pertaining to or as the result of a review of Confidential Information shall be subject to the terms of this Order. Parties serving on disk should serve both a confidential and non-confidential disk clearly marked as such.

- (b) Use of Confidential Information and Persons Entitled to Review. All Confidential Information made available pursuant to this Order to parties other than the Minnesota Public Utilities Commission, the Department of Commerce, and the Office of Attorney General (together, "the Government Agencies") shall be given solely to counsel for the requesting party and shall not be used or disclosed except for purposes of this proceeding; provided, however, that access to any specific Confidential Information may be authorized by said counsel, solely for the purpose of this proceeding, to those persons indicated by counsel as being the party's experts or witnesses in this matter.
- (c) Special limitation on use for Marketing Sensitive Information. The disclosing party may designate the Confidential Information as "Marketing Sensitive" information if it determines in good faith that the information made available would disclose product development, marketing plan or customer information. Such Confidential Information will not be made available to any employee of a party with responsibility for marketing, product development or market entry.
- (d) Identification of persons receiving access to Confidential Information. Counsel for each party other than the Government Agencies receiving such information as described in paragraphs 1(b) and 1(c) above will provide written notice to the disclosing party listing the names and firm or company affiliation of all experts to whom such information will be disclosed. In addition, if such experts are employees of the party or an affiliate, a general description of such employee's job responsibilities will be part of the notification required in this paragraph. Such notice will be made in sufficient time prior to receipt of information to provide reasonable opportunity for objection by the disclosing party.
- (e) Special Limitation on Use for Vendor Proprietary Information. If information containing Confidential Information as claimed by a third party vendor to be confidential ("Vendor Proprietary Information") is to be provided by a responding party, each party other than the Government Agencies receiving such information will provide written notice to the involved vendor indicating the information to be received and listing the names and firm or company affiliation of all attorneys and experts to whom such information will be disclosed. Such notice will be made in sufficient time prior to receipt of information to provide reasonable opportunity for intervention or objection by vendor(s). This notice is in addition to any notice that Qwest may be obligated to make to vendors as a result of its contractual agreements with them.

Similar notification and opportunity to object will be made in the event that additional attorneys or experts are to be given access by any party to vendor proprietary information during the course of any such proceeding. No expert gaining access to Vendor Proprietary Information may be an officer, director, employee, or major shareholder (holding 5% or more of total issued stock) of any corporation, partnership or other business entity that is a competitor or customer of a vendor whose proprietary information is made available hereunder. Any dispute concerning this restriction which cannot be resolved by the parties, may be brought before the arbitrator for resolution.

(f) Special Procedures for CLEC-Specific Data.

- (i) It is hereby ordered that Qwest shall produce information specific to CLECs reasonably requested by the parties relating to the analysis of performance or results of the QPAP and must only be made available to (i) the Commission and its Staff, (ii) the Residential and Small Business Utilities Division of the Office of the Attorney General; (iii) the Department of Commerce, and (iv) the specific CLEC whose results appear in the information. Aggregate data shall be provided to all parties, subject to the limitations in paragraph 1(f)(3).
- (ii) Information produced pursuant to paragraph 1(f)(1) will be masked so that each CLEC is only identified by a pseudonym (*i.e.*, “CLEC A,” “CLEC B,” etc.), unless that CLEC consents to the identification of the information, or the Commission issues an order requiring disclosure. Qwest will send a written notice to each CLEC whose information is to be produced. A copy of this Order shall accompany the notice. The notice shall indicate that the CLEC has five (5) business days from receipt of such notice to make any response or objection regarding the identification of information specific to that CLEC to the Commission. The notice shall state that if the CLEC consents, or fails to object or respond within five (5) business days, Qwest will provide the CLEC-specific information in unmasked form to the entities identified in paragraph 1(f)(1) of this Order. In the event that a CLEC files a timely objection to the disclosure, the Commission will consider that objection and issue an order regarding that CLEC’s information.
- (iii) The written notice from Qwest described in paragraph 1(f)(2) will inform CLECs if aggregate data is being disclosed on a wire center basis. Any objection by an individual CLEC to disclosure of aggregate data must be made in the same manner as for CLEC-specific information. No objection will be entertained for wire centers with four or more CLECs having data aggregated. No aggregate data will be disclosed by Qwest to any parties other than the governmental entities listed in paragraph 1(f)(1) until the time for objections has expired and any outstanding objections have been resolved.

- (iv) The following CLECs have given their approval for the disclosure of their CLEC-specific information unmasked and in accordance with paragraph 1(f)(1) of this Order: AT&T Communications of the Midwest, Inc., TCG Minnesota, Inc., AT&T Broadband Phone of Minnesota, Inc., Covad Communications Co., Crystal Communications d/b/a Hickory Tech, Ace Telephone Association, BEVCOMM, Inc., Encore Communications, HomeTown Solutions, LLC, Hutchinson Telecommunications, Inc., Mainstreet Communications, LLC, NorthStar Access LLC, Otter Tail Telecom, LLC, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, Inc., Unitel Communications, WorldCom, Time Warner and U.S. Link. Accordingly, disclosure of the unmasked identities of these consenting CLECs is hereby ordered. This consent for unmasked data does not preclude filing an objection to disclosure of aggregate data consistent with the procedure in paragraph 1(f)(3).
- (v) Documents containing CLEC-specific information that are produced pursuant to this Order will be labeled “NON-PUBLIC: HIGHLY SENSITIVE CLEC-SPECIFIC TRADE SECRET INFORMATION” and will be produced on pink paper.
- (g) The Government Agencies. The Minnesota Government Data Practices Act (“MGDPA”)¹ governs the maintenance and dissemination of data by Minnesota government entities. Therefore, the Government Agencies shall not disclose the information governed by this Order except as authorized by the MGDPA or other applicable law. The Office of the Attorney General and the Department of Commerce may provide the information to their respective experts retained to provide assistance on this matter, pursuant to the terms of this Order.
- (h) Nondisclosure Order. Prior to giving access to Confidential Information as contemplated in paragraph 1(b) above to any expert other than an employee of the Government Agencies, whether or not such expert is a person designated to testify in any such proceeding, counsel for the party seeking review of the Confidential Information shall deliver a copy of this Order to such person, and prior to disclosure such person shall agree in writing to comply with and be bound by this Order. In connection therewith, Confidential Information shall not be disclosed to any person who has not signed a Nondisclosure Agreement in the form which is attached hereto and incorporated herein as Exhibit "A." The Exhibit “A” Nondisclosure Agreement (Exhibit "A") shall require the person to whom disclosure is to be made to read a copy of this Protective Order and to certify in writing that he or she has reviewed the same and has consented to be bound by its terms. The agreement shall contain the signatory's full name, permanent address and employer, and the name of the party with whom the signatory is associated. Such agreement shall be delivered to counsel for the providing party prior to the expert gaining access to the Confidential Information.

¹ Minn. Stat. Chapter 13.

- (i) Availability of Documentation. As to highly sensitive documents and information, the parties shall have the right, at their option, to refuse to provide copies to counsel for the other party or to its experts as defined in paragraph 1(b). Should the parties refuse to provide copies, such documents shall be made available for inspection and review by counsel or experts at a place and time mutually agreed upon by the parties. Where copies are not provided, the counsel or expert reviewing the Confidential Information may make limited notes regarding the Confidential Information for reference purposes only. Such notes shall not constitute a verbatim or substantive transcript of the Confidential Information. For purposes hereof, notes made pertaining to or as the result of a review of Confidential Information shall be considered Confidential Information and subject to the terms of this Order.
2. (a) Challenge to Confidentiality. This Order establishes a procedure for the expeditious handling of Confidential Information. This Order shall not be construed as an agreement or ruling on the confidentiality of any such document.
- (b) In the event that the parties hereto are unable to agree that certain documents, data, information, studies or other matters constitute Confidential Information, Marketing Sensitive Information, Vendor Proprietary Information or CLEC-Specific Data, or any other highly sensitive documents and information referred to in paragraph 1(a), (c), (f) or (h) above, the party objecting to the protective classification shall forthwith submit the said matters to the Commission for review pursuant to this Order.
- (c) Any party at any time upon ten (10) days prior notice may seek by appropriate pleading to have documents that have been designated as Confidential Information removed from the protective requirements of this Order. If the confidential or proprietary nature of this information is challenged, resolution of the issue shall be made by the Commission's responsible authority after proceedings *in camera* which shall be conducted under circumstances such that only those persons duly authorized hereunder to have access to such confidential matter shall be present. The record of such *in camera* hearings shall be marked "CONFIDENTIAL--SUBJECT TO PROTECTIVE ORDER IN QPAP DOCKET."
3. (a) Receipt into Evidence. Provision is hereby made for receipt of evidence in this proceeding under seal. At least ten (10) days prior to the use of or substantive reference to any Confidential Information as evidence, the party intending to use such Confidential Information shall make that intention known to the providing party. The requesting party and the providing party shall make a good faith effort to reach an agreement so the information can be used in a manner which will not reveal its trade secret, confidential or proprietary nature. If such efforts fail, the providing party shall separately identify, within five (5) business days, which portions, if any, of the documents to be offered or referenced on the record containing Confidential Information shall be placed in the sealed record. Only one (1) copy of documents designated by the providing party to be placed in the sealed record shall be made and only for that purpose. Otherwise, parties shall make only general references to Confidential Information in this proceeding.

(b) In Camera Hearing. Any Confidential Information that must be orally disclosed to be placed in the sealed record in this proceeding shall be offered in an *in camera* hearing, attended only by persons authorized to have access to the Confidential Information under this Order. Similarly, cross examination on or making substantive reference to Confidential Information as well as that portion of the record containing references thereto, shall be marked and treated as provided herein.

(c) Return. Unless otherwise ordered, Confidential Information, including transcripts of any depositions to which a claim of confidentiality is made, shall remain under seal, shall continue to be subject to the protective requirements of this Order, and shall be returned to counsel for the providing party within 30 days after final settlement or conclusion of the applicable matter including administrative or judicial review thereof.

4. Use in Pleadings. Where reference to Confidential Information in the sealed record is required in pleadings, cross-examinations, briefs, argument or motions, it shall be by citation of title or exhibit number or by some other non-confidential description. Any further use of or substantive references to Confidential Information shall be placed in a separate section of the pleading or brief and submitted to the arbitrator under seal. This sealed section shall be served only on counsel of record (one copy each), who have signed a Nondisclosure Agreement, with the exception of counsel for the Government Agencies. All the protections afforded in this Order apply to materials prepared and distributed under this paragraph.
5. Preservation of Confidentiality. All persons who may be entitled to receive, or who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for purposes of business or competition, or any other purpose other than the purposes of preparation for and conduct of these proceedings, and then solely as contemplated herein, and shall take reasonable precautions to keep the Confidential Information secure and in accordance with the purposes and intent of this Order.
6. Reservation of Rights. The parties hereto affected by the terms of this Protective Order further retain the right to question, challenge, and object to the admissibility of any and all data, information, studies and other matters furnished under the terms of this Protective Order in response to interrogatories, requests for information or documents or cross-examination on the grounds of relevancy or materiality. This Order shall in no way constitute any determination precluding, or waiver of, the rights of any party herein to contest any assertion or finding of trade secret, confidentiality or privilege.
7. Files of the Government Agencies. The files of the Government Agencies containing Trade Secret or Confidential Information shall be treated as required by Minn. Stat. §§ 13.01 *et seq.* and 138.161 *et seq.*

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

(S E A L)

This document can be made available in alternative formats (i.e., large print or audio tape) by calling (651) 297-4596 (voice), (651) 297-1200 (TTY), or 1-800-627-3529 (TTY relay service).

EXHIBIT A

I have reviewed the foregoing Protective Order issued January 8, 2002, in the docket encaptioned *In the Matter of Qwest's Performance Assurance Plan (QPAP)*, MPUC Docket No. P-421/AM-01-1376, with respect to the review and use of Trade Secret Information, Confidential Information, Marketing Sensitive Information, Vendor Proprietary Information or CLEC-Specific Data, as defined therein, and in consideration of being granted access to such information which I could not otherwise readily obtain, I agree to be bound by the terms and conditions of such Order.

Signature

Name (type or print)

Residence Address

Employer or Firm

Business Address

Party

Date